National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: December 11, 1996

TO: Gerald Kobell, Regional Director, Region 6

FROM: Barry J. Kearney, Associate General Counsel, Division of Advice

SUBJECT: Burns International Security Services, Inc., Case 6-CA-28377

524-0167-1033, 524-0167-1033-5000, 524-5029-1400

This Section 8(a)(3) case was submitted for advice on whether the Employer, who had locked out unit employees, then unlawfully refused to make contributions to employee participants in its 401(k) Plan by claiming that the locked out employees were not "actively employed" and thus ineligible for contributions under the Plan.

The Employer locked out unit employees from December 4, 1995 until February 8, 1996, when the parties finally reached agreement upon the terms of a new bargaining agreement. Around two months later, employees discovered that employee participants in the Employer's 401(k) Plan had not received the Employer's matching contributions. The Employer argued that locked employees had been ineligible for matching contributions under the applicable language of the Plan. Plan Article V, "Employer Contributions", provides in relevant part:

The matching contributions will be made at the end of the calendar year provided the participant works at least 1000 hours during the year and is actively employed on December 31.

The Plan's only definition of "actively employed" is set forth in Section 2.37, "Termination of Employment" which concerns the rights of terminated employees including the right to withdraw funds:

Reference under the Plan to a termination of employment, or to a participant employee who terminates his employment, or the like, means an employee's ceasing to be in the active employ of the Employer (irrespective of any seniority or recall rights) for any reason (including resignation, discharge, disability, layoff, retirement, entrance into military service) other than death or an authorized leave of absence in accordance with the Employer's leave of absence policy.

There is no claim that the Employer's lockout was unlawful. The Employer has stated that it is unwilling to arbitrate this dispute over the impact of the Plan's language.

We conclude, in agreement with the Region, that the instant lockout is analogous to an employee strike situation, and that the Employer therefore violated Section 8(a)(3) by failing to make Plan contributions based upon its lock out of the employees.

It is well settled that an employer is not required to finance a strike, and thus may cease paying wages to strikers.[(1)]

An employer may not, however, withhold payment of already earned or accrued benefits to strikers based on their participation in a strike. Thus, in NLRB v. Great Dane Trailers, Inc., 388 U.S. 26 (1967), the Supreme Court upheld the Board's finding that an employer violated Sections 8(a)(3) and (1) when it refused to pay accrued vacation benefits to striker employees while announcing an intention to pay such benefits to striker replacements, returning strikers, and nonstrikers.[(2)]

In Texaco, Inc., 285 NLRB 241 (1987), the Board stated that the Great Dane test would be used to determine the lawfulness of an employer's refusal to pay benefits to employees because of a strike[(3)]

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Under this test, the General Counsel bears the prima facie burden of proving at least some adverse effect of the benefit denial on employee rights. The General Counsel can meet this burden by showing that (1) the benefit was accrued and (2) the benefit was withheld on the apparent basis of a strike.... Once the General Counsel makes a prima facie showing of at least some adverse effect on employee rights, the burden under Great Dane then shifts to the employer to come forward with proof of a legitimate and substantial business justification for its cessation of benefits. The employer may meet this burden by proving that a collective-bargaining representative has clearly and unmistakably waived its employees' statutory right to be free of such discrimination or coercion.... If the employer does not seek to prove waiver, it may still contest the disabled employees' continued entitlement to benefits by demonstrating reliance on a nondiscriminatory contract interpretation that is 'reasonable and...arguably correct,' and thus sufficient to constitute a legitimate and substantial business justification for its conduct. Moreover, as under Great Dane, even if the employer proves business justification, the Board may nevertheless find that the employer has committed an unfair labor practice if the conduct is demonstrated to be 'inherently destructive' of important employee rights or motivated by antiunion intent. (4)

A benefit is accrued under Texaco, if it is "due and payable on the date on which the employer denied [it]." (5)

Accrued benefits do not depend on a return to work or future employment, but rather stem from the existence of a past employment relationship. (6)

Applying Texaco and Great Dane to the instant case, involving a lockout rather than a strike, it seems clear that a prima facie violation exists, i.e., the 401(k) contribution benefit had accrued and then been denied based upon Section 7 activity. First, the benefit had accrued because employees had worked the requisite 1000 hours and would have been "actively employed" on December 31 but for their status of having been locked out in a bargaining dispute. (7) Second, the accrued benefit was withheld on the apparent basis of Section 7 activity, viz., maintaining bargaining demands in the face of a lockout. With this prima facie showing of a discriminatory effect, the burden shifts to the Employer to show a legitimate and substantial business justification for having denied the benefits.

The Employer's business justification here is its interpretation of the Plan's eligibility requirement to not include lockout status as "active employment." Under Texaco, this interpretation must be nondiscriminatory, reasonable, and arguably correct. We conclude that the Employer interpretation fails because it is unreasonable and not arguably correct.

First, the Employer's exclusion of lockout status from "active employment" is an unreasonable interpretation of the pertinent "Termination of Employment" section of the Plan. That section's purpose is to define circumstances under which an immediate distribution of an account's assets may be permitted because the participant is no longer "in the active employ" of the Employer. The examples of a break in service sufficient to trigger such a result expressly include "resignation, discharge, disability , layoff, retirement, entrance into military service...". We note first that all these examples envision relatively long term if not permanent breaks in service which otherwise are keyed to either the unavailability of work (layoff) or the inability or unwillingness of the participant to perform available work. The denial of readily available work, to employees who are ready willing and able to perform that work, appears to be outside the kind of break in service envisioned by this definition.

More importantly, the Employer did not treat the employees' lock out status as a "termination of employment" sufficient to trigger rights under this provision. There is no evidence that the Employer provided locked out employees with the option to withdraw money or otherwise notified locked out employees that their invested Employer contributions were forfeited. Since the Employer apparently viewed the lockout as an insufficient "termination of service" to trigger these rights or obligations, the Employer may not reasonably interpret the lockout as a "termination of service" for the purpose of denying matching contributions. We therefore conclude that the Employer's interpretation is inconsistent, unreasonable and not arguably correct, and thus is not substantial and legitimate business justification for its conduct.

In addition, even assuming, arguendo, that the Employer's contract interpretation were reasonable and correct, we conclude that this interpretation is unlawful as "inherently destructive" of important employee bargaining rights.

Under Great Dane, the denial of an accrued benefit to strikers, while granting that benefit to nonstrikers, is inherently destructive of the right to strike even though a strike in support of bargaining demands is voluntarily engaged in by the striking

employees. Here, the lockout of the employees similarly was the direct result of the employees' bargaining demands, but was involuntary and within the exclusive control of the Employer. If denying accrued benefits only to strikers because of their voluntary strike is inherently destructive, a fortiori, the denial of accrued benefits only to employees who are involuntarily locked out also is "inherently destructive" of employee bargaining rights.[(8)]

In sum, the Employer violated Section 8(a)(3) by failing to make Plan contributions based upon the lock out of employees, because the Employer thereby withheld accrued benefits because of the employees' bargaining position based upon an unreasonable and incorrect contract interpretation, which in any event is "inherently destructive" of the employees' bargaining rights.

B.J.K.

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[1] General Electric Co., 80 NLRB 510, 511-12 (1948).

[2] Great Dane set forth a two-part test for determining whether an employer has committed a violation:

First, if it can reasonably be concluded that the employer's discriminatory conduct was 'inherently destructive' of important employee rights, no proof of an anti-union motivation is needed and the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations. Second, if the adverse effect of the discriminatory conduct on employee rights is 'comparatively slight,' an anti-union motivation must be proved to sustain the charge if the employer has come forward with evidence of legitimate and substantial business justifications for the conduct. Thus, in either situation, once it has been proved that the employer engaged in discriminatory conduct which could have adversely affected employee rights to some extent, the burden is upon the employer to establish that he was motivated by legitimate objectives since proof of motivation is most accessible to him. 388 U.S. at 34 (emphasis in original).

[3] See also Bil-Mar Foods, Inc., 286 NLRB 786(1987); Amoco Oil, 285 NLRB 918 (1987).

[4] Texaco, supra, 285 NLRB at 245-246 (emphasis in original, footnotes omitted).

[5] Id., slip op. at 15 (quoting Emerson Electric Co. v. NLRB, 650 F.2d 463, 469 (1981), cert. denied 455 U.S. 939 (1982)).

[6] Murphy Oil USA, Inc., 286 NLRB 1039 (1987); see Conoco, Inc. v. NLRB, 740 F.2d 811 (10th Cir. 1984).

[7] See Advertiser's Mfg. Co., 294 NLRB 740 (1989) where the employer denied holiday pay to strikers because they had not met the "active" on duty requirement in the employer's handbook. The Board found that the General Counsel had established a prima facie case, i.e., that the holiday pay had accrued to the strikers. The Board noted that the employer's handbook contained exceptions and provided for holiday pay in certain circumstances, notwithstanding employee absences on pertinent eligibility dates. In the instant case, the Employer's Plan definition of "actively employed" similarly provides for exceptions including "authorized absences." Thus the employees right to matching contributions here similarly had accrued on December 31.

[8] For example, during a future bargaining dispute, e.g., during the processing of a grievance, the Employer may again lockout employees for one or two days over the December 31 date. Under the Employer's interpretation of the contract, such a temporary grievance processing lockout would permanently deny employees their annual 401(k) Plan retirement contributions. This result, a denial of annual retirement contributions because of employee bargaining demands, is inherently destructive of employee bargaining rights.